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SUPREME COURT, U.S.

No. 06-577

IN THE

Supreme Court of the United States

GARY SCHOR, a Florida resident, on behalf of himself and all others similarly situated,

Petitioner,

v.

ABBOTT LABORATORIES, an Illinois corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. The Seventh Circuit's Opinion Directly Conflicts with Rulings of the Second and Ninth Circuit Courts of Appeals.

The Seventh Circuit's analysis of the monopoly leveraging theory is not *dicta*, as Abbott claims, but rather forms the foundation of the court's holding in *Schor v. Abbott Labs.*, 457 F.3d 608 (7th Cir. 2006), as is evidenced by the court's express rejection of the Ninth Circuit's ruling in *Image Technical Servs., Inc. v. Eastman Kodak Co. (Kodak II)*, 125 F.3d 1195 (9th Cir. 1997):

> [W]e think it better to join the Federal Circuit in saying that *Image Technical* just got it wrong.
>
> . . . .
>
> A district court in California must apply the ninth circuit's decision in *Image Technical*. We need not. Having concluded that *Image Technical* misunderstood the Sherman Act, we are unwilling to allow its effect to extend beyond the boundaries of that circuit.

Schor, 457 F.3d at 613, 615. In fact, much of the Seventh Circuit's opinion is devoted to explaining precisely *why* it was rejecting the Ninth Circuit's decision. *See id.* at 611–614 ("That leaves us with the question whether there is a free-standing theory of 'monopoly leveraging.'"). Thus, its decision not to recognize a monopoly leveraging theory of antitrust liability further complicates the already-existing circuit split surrounding this legal theory and makes the case proper for review by the Court.

The Seventh Circuit did not merely base its decision "on the unique facts of this case," as Abbott contends. Def. Resp. at 1. Rather, the court spent a great deal of time and effort explaining its rejection of the monopoly leveraging theory, not only under the current factual circumstances, but under any circumstance. *See Schor*, 457 F.3d at 611–13.

Moreover, as Abbott itself notes, "antitrust laws are implicated only when a patent holder extends its monopoly power 'beyond the limits of what Congress intended to give in the patent laws.'" Def. Resp. at 15 (citing *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990)). Injuring consumers who have a fatal disease cannot be summarily excused under such a rubric empowered by the present conflict existing between the Circuit Courts of Appeals. And while Abbott argues that its patents for Norvir "covering both markets" are dispositive of the matter, the Seventh Circuit premised that the Ninth Circuit's analysis of monopoly leveraging was wrong, irrespective of particular patent implications. *See Schor*, 457 F.3d at 614 ("But *why* would a patent matter?") (emphasis in original); *id.* at 615 ("Having concluded that *Image Technical* misunderstood the Sherman Act, we are unwilling to allow its effect to extend beyond the boundaries of that circuit.").

In its response, Abbott notably makes no mention of the California district court decisions upholding claims identical to those at issue here, yet boldly asserts that "even under Ninth Circuit law, Abbott must prevail." Def. Resp. at 16; *see Doe v. Abbott Labs.*, No. 04-CV-1511, 2004 WL 3639688 (N.D. Cal. Oct. 21, 2004); *Serv. Employees Int'l Health and Welfare Fund v. Abbott Labs.*, No. 04-CV-4203, 2005 WL 528323 (N.D. Cal. Mar. 2, 2005). Quite to the contrary, under Ninth Circuit law, Abbott lost. Allowing the Seventh Circuit's decision to stand will thus create great uncertainty for both plaintiffs and defendants, as monopoly leveraging claims

under similar circumstances can be brought in some circuits but not others, and will lead to forum shopping.

II. *Berkey* has Not Been Overruled and is Still Good Law.

This Court has not overruled *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), or fully addressed the merits of the monopoly leveraging doctrine. The core theory of monopoly leveraging set forth in *Berkey* has lived on, even though circuit courts other than the Second Circuit have added to or clarified elements of it. *See, e.g., Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991) (requiring actual or attempted monopolization in conjunction with a monopoly leveraging claim); *see also Image Technical Servs., Inc. v. Eastman Kodak Co. (Kodak II)*, 125 F.3d 1195 (9th Cir. 1997). Consequently, Abbott's position mischaracterizes the current state of the law.

In *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 n.4 (2004), this Court only briefly, in a footnote, touched upon the doctrine of monopoly leveraging. While the Court implicitly recognized that "leveraging presupposes anticompetitive conduct," even were this language not *dicta*, such a standard has been met here. *Id.* Petitioner alleged that Abbott unlawfully attempted to utilize its monopoly in the "booster" market to monopolize the "boosted" market. Abbott, in an attempt to escape the obvious, relies on *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993), a case that sets forth the requirements for establishing a claim of attempted monopolization. Petitioner was never given the opportunity to prove Abbott's attempted monopolization of the "boosted" market, as his claim was dismissed for failing to state a cause of action. The question of whether Abbott's conduct is summarily protected by law is trapped along with the answer to the far-reaching and clear conflict between the circuits.

III. The Public Health and Welfare Concerns Inherent in Schor's Claim Emphasize the Importance of the Issue.

Schor and the multitude of others so afflicted, as well as those who will unfortunately follow, are undeniably forced to rely on Norvir and the boosted cocktails, as survival depends on them. Neither Abbott nor any other company can be allowed to auction off crucial drugs to the highest bidder via anticompetitive conduct. This case clearly and unequivocally demonstrates the need to resolve the conflict existing between the circuits on monopoly leveraging.

CONCLUSION

Abbott's ability, as shown in its response, to utilize existing authority to diffuse the glaring separation of positions between the Circuit Courts of Appeals underscores the need for this Court to resolve this critical antitrust question. For the reasons stated above and in his Petition for a Writ of Certiorari, Petitioner Gary Schor respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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